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ALEXANDER L. STEVAS,
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No. 83-640

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

THE STATE OF TEXAS

Appellant,

VS.

KVUE-TV, INC., ET AL,

Appellees.

On Appeal from
The United States Court of Appeals
for the Fifth Circuit

MOTION OF APPELLEES KVUE-TV, INC., AUSTIN BROADCASTING CO., INC., AND CENTRAL TEXAS BROADCASTING CO., INC. TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I. Whether the Tenth Amendment precludes federal regulation of political advertising.

II. Whether the Texas statute setting the rates that may be charged for political advertising conflict with federal law and, therefore, are pre-empted.

III. Whether the Texas statute requiring broadcasters to charge lower rates for political advertising than comparable commercial advertising has the effect of compelling broadcasters to subsidize political campaigns in violation of the broadcasters' rights under the First and Fourteenth Amendments.

PARTIES TO THE PROCEEDING

Appellant The State of Texas was Intervenor-Defendant in the District Court and Appellee in the Court of Appeals.

Appellee Margaret Moore, in her official capacity as County Attorney for Travis County, Texas, was Defendant in the District Court and Appellee in the Court of Appeals.

Appellee KVUE-TV, Inc. was Plaintiff in the District Court and Appellant in the Court of Appeals.

Appellees Austin Broadcasting Corp. and Central Texas Broadcasting Co., Inc. were Intervenor-Plaintiffs in the District Court and Appellants in the Court of Appeals.

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Statutes and Rules:

Texas Election Code

art. 14.09(B) 2, 3, 10
art. 14.09(B)(1) 6, 7

United States Code

47 U.S.C. § 315 3
47 U.S.C. § 315(b) 2, 5, 6

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Other Authorities:

S. Conf. Rep. No. 580, 92d Cong. 1st Sess. (1970), reprinted in 1972 U.S. Code Cong. & Ad. News 1866, 1867 7

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Appellees KVUE-TV, INC., AUSTIN BROADCASTING CO., INC. and CENTRAL TEXAS BROADCASTING CO., INC., pursuant to Rule 16 of the Rules of the Supreme

Court of the United States, respectfully move to dismiss the appeal or affirm the judgment of the United States Court of Appeals on the ground that the questions on which the decision of the cause depends were correctly decided and do not present a substantial federal question.

STATEMENT

This is an appeal from the judgment entered by the United States Court of Appeals for the Fifth Circuit holding that a Texas statute which regulates the rates charged by radio and television stations for political advertising, Tex. Elec. Code art. 14.09(B), conflicts with the federal statute regulating such rates, 47 U.S.C. § 315(b), and is therefore preempted.

Appellees are Texas broadcasters regulated and licensed by the Federal Communications Commission (FCC).

Appellees are required to comply with 47 U.S.C. § 315 which regulates the rates at which they can sell advertising to legally qualified candidates for any public office, state or federal. The federal statute requires that for the periods beginning 45 days before the primary election and 60 days before the general election, Appellees charge a rate for political advertising no greater than the lowest unit charge made to other advertisers during the same period. It also prohibits licensees from discriminating against candidates for political office at any time.

Similarly, Texas Election Code art. 14.09(B) makes it a crime for a radio or television station to charge a rate for political advertising that exceeds the lowest unit charge made by the station to other advertisers "for the same class, condition and amount of

time." However, the Texas statute, unlike the federal law, is not limited to specified time periods before elections, but applies to all times.

I. CONGRESS' POWER TO REGULATE BROADCAST LICENSEES INCLUDES THE POWER TO REGULATE THE CHARGES THOSE LICENSEES MAKE FOR POLITICAL ADVERTISING ASSOCIATED WITH STATE AND LOCAL ELECTIONS.

Appellant contends that Congress is barred by the Tenth Amendment from regulating the charges federally licensed broadcast stations make for political advertising associated with state and local elections. That argument was not presented to the district court or to the Court of Appeals and neither court expressly passed on the issue. The issue was not timely or properly raised and, therefore, the appeal should be dismissed. U.S. Sup. Ct. Rule 16.1(b).

Appellant's argument fails on the merits as well.

Appellant does not argue that the broadcast of political advertising by federally licensed radio and television stations does not affect interstate commerce. Instead, Appellant argues that Congress is prohibited by the Tenth Amendment from regulating broadcasters in this manner. Appellant claims that the regulation imposed by 47 U.S.C. § 315(b) on radio and television stations interferes with the State's sovereign right to regulate its own elections.

The requirement imposed by 47 U.S.C. § 315(b) on federally licensed radio and television stations is a part of a comprehensive set of regulations imposing duties and obligations on those persons holding licenses from the Federal Comunications Commission to operate such stations. It does not purport to regulate a state's conduct of its own

elections. It regulates licensed broadcasters, not states.

This Court held in Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981) that the threshold inquiry concerning a state's Tenth Amendment claim is whether the challenged regulation regulates the "states as states." Again, 47 U.S.C. § 315(b) regulates licensed broadcasters, not states; Appellant's argument does not cross this threshold.

II. CONGRESSIONAL REGULATION OF BROADCAST LICENSEES' RATES FOR POLITICAL ADVERTISING PREEMPTS STATE REGULATION OF THOSE RATES.

The Court of Appeals' conclusion that 47 U.S.C. § 315(b) preempts Texas Election Code art. 14.09(B)(1) properly applies recognized preemption principles. Appellant's challenge to that decision does not raise a substantial federal question and should be dismissed.

The Texas statute is unique in that it carves out for special regulation persons who operate pursuant to and in accordance with federally granted licenses. Unlike statutes regulating misleading advertising or the like and which affect broadcasters along with everybody else, Article 14.09(B)(1) is an effort by Texas to place a special economic burden on federal licensees. Moreover, the Texas statute deals with an area of regulation Congress has carefully considered and provided carefully tailored rules to control.

Congress fully considered the extent of the obligations it was imposing on its federal licensees, and the legislative history of the Act clearly shows that Congress rejected the broader burden that the Texas Act imposes. S. Conf. Rep. No. 580, 92d Cong., 1st Sess. (1970), reprinted in 1972 U.S. Code Cong.

& Ad. News 1866, 1867. Congress struck a balance between the economic burden on its licensees and its desire to control the cost of political campaigns. Congress decided that the licensees should be required to subsidize political speech, but only for specified periods before elections and only when the election involved candidates and not referenda on political issues.

The Texas Legislature has attempted to impose on federally licensed broadcasters an additional financial burden that Congress considered and rejected. The Court of Appeals noted that Congress specifically concluded that it should limit the length of time when the favored rate would be available as an incentive to candidates to shorten the duration of their campaigns. See Appendix at p. A-31, 32.

The Court of Appeals recognized the enforcement of the Texas statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). See Appendix at A-33, 34. And since the Texas statute is directed particularly at broadcasters, it intrudes into an area where there is a pervasive scheme of federal regulation and where Congress and the State Legislature have addressed the same problem. Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, ___ U.S. ___ (1982); Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Com., ____ U.S. ____ (April 21, 1983, 511 U.S.L.W. 4449). There is no substantial question that the Texas statute has been preempted.

III. THE TEXAS STATUTE IS AN UNCONSTITUTIONAL INFRINGEMENT OF APPELLEES' FIRST AND FOURTEENTH AMENDMENT RIGHTS.

Although it was unnecessary for the Court of Appeals to address the issue, it is clear that Article 14.09(B) is a violation of Appellees' rights guaranteed by the First and Fourteenth Amendments. The statute requires Appellees either to forego broadcasting political advertising or to subsidize that advertising. This Court has held that the First and Fourteenth Amendments prohibit a state from requiring a newspaper to publish free political advertising. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). The Florida statute before the Court in Tornillo "exact[ed] a penalty on the basis of the content of a newspaper." The Texas statute has the same effect.

Governmental restraints on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations. Grosjean v. American Press Co., 297 U.S. 233, 244-245 (1936). See Gore Newspaper Co. v. Shevin, 397 F. Supp. 1253 (S.D. Fla. 1975) aff'd on basis of district court opinion, 550 F.2d 1057 (5th Cir. 1977).

Congress may have the authority to require its licensees to provide access to the airwaves to political candidates and require conduct by licensees that would, if there were no special need for a federal licensing system,[1/] violate First Amendment guarantees. But states do not have that kind of special relationship with broadcasters that might support an intrusion into areas protected

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1. See CBS, Inc. v. FCC, 453 U.S. 367 (1981); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

by the First Amendment. The Texas statute violates the First and Fourteenth Amendments and cannot stand.

CONCLUSION

This appeal should be dismissed or the judgment of the Court of Appeals should be summarily affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that three true and correct copies of the foregoing Motion to Dismiss or Affirm have been mailed, certified mail, return receipt requested, to all counsel of record, to-wit: James W. Collins, Esq., Assistant County Attorney, P.O. Box 1748, Austin, Texas 78767, attorney for Margaret Moore, in her official capacity as County Attorney for Travis County, Texas, and David R. Richards, Esq., Executive Assistant Attorney General, State of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711, on this the 17th day of November, 1983.

Roger James George, Jr.